

GENERAL INTRODUCTION

Emphasis in customary law is on **duties** whereas most people place the emphasis on rights.

Customary law: *the customs and usages traditionally observed among the indigenous African peoples of SA and which form part of the culture of those peoples* (sec 1, Recognition of Customary Marriages Act).

- Synonymous with “indigenous law”

Divisions of customary law

- 1.) Tribal law (national law) and the law of different tribes (international law)
- 2.) Public law and private law
 - a.) Public law
 - i.) Indigenous constitutional and administrative law
 - ii.) Indigenous adjudicatory organs and law of procedure
 - iii.) Indigenous criminal law
 - b.) Private law
 - i.) Law of persons
 - ii.) Family law
 - iii.) Law of things (immaterial property, e.g. copyright, *unknown* in SA customary law)
 - iv.) Law of obligations
 - v.) Law of succession
 - vi.) Law of personality
- 3.) Substantive and adjective (procedural) law

Rights in customary law:

Right	Object	Example
Real right	Corporeal thing apart from the person	Ownership
Obligatory right	Performance	Right to a fee for professional services
Right of authority	Productivity and freedom of a group member	Guardianship
Right of personality	Corporeal or incorporeal part of vestee’s personality	Right to one’s body/ right to one’s honour

1st 3 within vestee’s estate – any loss is patrimonial loss and is basis for action for **damages**

Rights of personality do not fall within vestee’s estate – violation results in action for **satisfaction**

Group ownership is typical among indigenous African people. Both rights and duties vested in agnatic group.

Division and features of indigenous African people of Southern Africa

- 1.) Nguni groups – composite household divided into 2 or 3 sections, each with a senior wife
 - a.) Zulu
 - b.) Xhosa
 - c.) Swazi
 - d.) Ndebele
- 2.) Sotho groups – household not divided into sections. Each married woman has a rank and her house has own identity, property and successor
 - a.) Tswana
 - b.) Sotho
- 3.) Venda
- 4.) Shangana-Tsonga

CHARACTERISTICS OF ACL

Indigenous legal systems of Africa do not form a single system. *Family of systems which share no traceable common parent... But reveal sufficient similarity of procedure, principles, institutions, and techniques for a common account to be given of them*

- 1.) **Unwritten nature** of ACL
 - Transmitted orally from one generation to the next
 - Public participation of adult men in administration of justice
 - Community has broad general knowledge of law
 - Legal principles expressed as legal maxims
- 2.) **Customary nature**
 - Legal system a result of age-old traditions customs
 - No system of precedent
- 3.) **Expression of community values**
 - Public participation resulted in law giving expression to prevalent values
 - As values changed, so did law
 - Conflict between legal and moral values unknown
 - “human” justice – emphasis on reconciliation and maintaining harmony in community (not on who is right and who is wrong)
- 4.) **Magico-religious conceptions**
 - a.) **Belief in ancestral spirits**
 - Ancestral spirits maintain contact with living relatives on earth
 - They have an interest in the community and make their wishes known
 - Rules for living and law derived from ancestors and protected by ancestral spirits
 - Any disregard/deviation from rules may lead to punishment by ancestral spirits (e.g. illness, drought, hail, floods)
 - Effect on law:

- i.) Supernatural basis means law is seldom questioned
- ii.) Law static and unchangeable as any change may be against wishes of ancestral spirits

b.) **Belief in sorcery**

- Sorcerers must be identified and removed from the community
- Supernatural process often implemented to identify sorcerer then he/she is killed or removed

5.) **Observance of rules for living**

- Factors in voluntary observance:

- a.) Religious element of the law
- b.) Public opinion (in customary law, interests of community very important)
- c.) Knowledge that if a person is harmed that person will endeavour to get compensation or take measures to protect him/herself (sorcery)
- d.) The fact that everybody in the community has broad general knowledge of the law
- e.) Fear of supernatural punishment
- f.) Influence of indigenous leaders who are regarded as living representatives of ancestors
- Authority emanating from indigenous hereditary position alone enough to ensure observance of law without formal administration of justice
- Local heads of families and kinship groups consulted before anything important – ensured that proposed action would not be opposed and that interests of others would not be harmed

NATURE OF CUSTOMARY LAW

Legal systems differ in terms of degree of specialisation

Specialisation – distinction of certain functions or definition of certain activities; *separation, differentiation, division, distinction, classification, delimitation, definition or individualisation in respect of time, activity, functions, interests, duties, knowledge and conceptions, including the isolation or abstraction of ideas and concepts*

Specialised legal system	Unspecialised legal system
Individual orientation	Group orientation
Abstract approach	Concrete approach
No religious element	Religious element
Highly categorised	Lack of categorisations
Kinship has no role	Kinship has important role
Monogamy	polygyny
Formalities	Lack of formalities
Time is important factor	Time is not important
Separation of powers	No separation of powers

Group versus individual orientation

- In specialised legal systems, emphasis on individual and individual may uphold his rights even when it is against the interests of the state/community
- In unspecialised legal systems, emphasis on the group rather than the individual. Individual functions entirely within context of the group

Rights

- Rights vested in group, not individual
- Group (not individual) is owner/creditor
- Ruler does not rule as an individual, but only as the representative of the ruling family

Law of marriage

- Marriage concerns family groups – both family groups participate in choice of marriage partner, negotiations, agreement, transfer of marriage goods and ceremonies
- Parties who acquire rights and duties are the households of the bride and groom

Law of contract

- Parties to contract are agnatic groups rather than individuals

Criminal law

- Whole family group could be punished for crime of one its members
- Fines paid by group
- In sorcery, whole family banished or killed
- Parents liable for wrongs of their children

Administrative law

- Public takes active part in proceedings – cross-examining witness and discussing the case
- Negotiations for extrajudicial settlement take place between family groups, not individuals

Concrete versus abstract approaches

- Unspecialised legal systems follow a more concrete and visible approach than specialised legal systems, which tend to be more abstract in nature.
- Abstract consent and abstract expression of intent replaced by apparent observable, visible acts from which consent becomes obvious in a concrete way
- Marriage – actual handing over of bride and marriage goods
- Oral agreement supplemented with actual handing over of object
- Importance attached to concrete evidence (fact that a married woman spent the night in a hut with another man is considered evidence of adultery)
- Rights to land acquired in a visible, perceptible manner by demarcating and actually using the land
- Legal communities very concrete in feelings of people and terminology – referred to as a “person”

or “cow”. Organs of legal community defined as parts of the body (e.g. headmen are ears and eyes)

The religious element

- Belief that law originates with the ancestors
- Disregard of law punished by ancestors because regarded as disrespect, neglect and contempt of ancestors
- Reconciliation between community and ancestors is usually accomplished by slaughtering an animal and having a communal meal
- If important juristic acts are planned, blessing of ancestors obtained through special rites
- Extraordinary evidence (e.g. identification of sorcerers) is well-known in customary law

Categorisation

- Sharp distinction between categories, institutions and concepts is foreign to customary law
- In specialised legal systems there is a clear division between criminal and civil cases and each has its own procedure
- In unspecialised systems, criminal and civil cases are tried in a single hearing
- No separate court procedures
- No distinction between crimes and delicts

Kinship

- Kinship plays dominant role in legal life
- Household = legal unit
- Wider family circle (family group) has extensive authority over its members

Polygyny

- One man can be involved in a marital union with more than one woman

Lack of formalities

- Administration of justice relatively informal
- Legal rules applied with great flexibility
- Aim of court to effect reconciliation
- Emphasis on people in context of community, and not on strict application of legal rules
- Constant consultation – family; court councilors

Time

- In specialised legal systems, specific moments are important to determine when rights and duties come into existence (e.g. moment of birth, death, marriage, when contract comes into being)
- In unspecialised systems precise moment is not important – only that the event did actually occur
- Prescription is unknown to unspecialised systems

Governmental functions

- Specialised systems distinguish clearly between judicial, executive and legislative powers

- Tribal chief is lawmaker, executive chief and judge
- Possibility of defective administration of justice and misrule counterbalanced by close relation between law and religion, public nature of administration of justice and people’s intimate knowledge of legal system

CUSTOMARY LAW AND THE CONSTITUTION

Prior to 1994 constitution, indigenous law was given uniform recognition with promulgation of **Black Administration Act 38 of 1927**

- Some courts had discretion to apply indigenous law in cases between indigenous African people
- This discretion was extended to all courts in **1988**

Sec 11 of BAA re-enacted as sec 54A of **Magistrate’s Court Act (1944)**, which was later repealed by sec 1 of the **Law of Evidence Amendment Act (1988)**:

- (1) *Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobolo or bogadi or other similar custom is repugnant to such principles.*
- (2) *The provisions of subsection (1) shall not preclude any party from adducing evidence of the substance of a legal rule contemplated in that subsection which is in issue at the proceedings concerned*
- (3) *In any suit or proceedings between Blacks who do not belong to the same tribe, the court shall not in the absence of any agreement between them with regard to the particular system of indigenous law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place (not being within a tribal area), the court shall not apply any such system unless it is the law of the tribe (if any) to which the defendant or respondent belongs*

Implications on sec 1 of LEAA

- All courts may take judicial notice of indigenous law, although they are not obliged to do so
- Judicial notice limited in so far as indigenous law may be ascertained readily, with sufficient certainty
- No duty on courts to take judicial notice of indigenous law by, for instance, calling in expert witnesses
- Not necessary for judges to have any formal/ practical knowledge of/ training in indigenous law

- Onus on party to prove indigenous law in court – places financial burden on litigant who must obtain services of an expert witness
- Condition: must not be opposed to principles of public policy or natural justice (*contra bonos mores*)

Sec 211 of the 1996 Constitution:

- (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution***
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs***
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law***

Implications of sec 211(3)

- All courts must apply customary law
- Recognition and application of customary law subject to the Bill of Rights
- Recognition and application of customary law subject to legislation that specifically deals with it
- Courts determine when customary law is applicable – this discretion should be exercised in agreement with general principles of choice of law

Sections 30 and 31 of the Constitution

Sec 30: Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights

The concept of “culture” mentioned in sec 30 may well be interpreted as including customary law

Sec 31(1): Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

- To enjoy their culture, practise their religion and use their language; and***
- To form, join and maintain cultural, religious and linguistic association and other organs of civil society***

Section 31 gives state 2 duties:

- 1.) Not to interfere with rights of the individual
- 2.) To allow the existence of institutions that would be necessary to maintain the culture concerned

Sec 31 upholds another aspect of right to culture: right of a group of people to have and maintain a specific group identity. Group and individual identity symbiotic in nature – individual right to adhere to culture of choice assumes existence of a cultural group or community

Secs 30 and 31 convert a freedom into a constitutional right

Customary law and the BoR

Customary law has been accepted and recognised as part of the SA legal system. Like other laws, it is subject to BoR

Recognition of customary law and constitutional prohibition against discrimination (sec 9(3)) gives rise to conflict between 2 opposing principles:

- 1.) Right of individual to equal treatment
- 2.) Right of group to adhere to culture of its choice

Principle of male primogeniture inherent in ACL yet discriminates unfairly against women.

BoR emphasises individual rights, whereas customary law emphasises the group, community, and the individual within the context of the community

BoR emphasises rights; customary law emphasises duties

Constitution does not give clear answer to conflict.

There are, however, ***indications that fundamental rights have priority over customary law:***

- ***Sec 2*** – Constitution is supreme law
- ***Sec 8(1)*** – BoR applicable to all laws
- ***Sec 36(2)*** – no fundamental rights will be limited by any law, except under 36(1) or other consti prov
- ***Sec 39(1)*** – requires courts to promote values that underlie an open and democratic society based on human dignity, equality and freedom in interp BoR
- ***Sec 39(2)*** – in interpreting any law and applying and developing common and customary law, courts must have due regard for spirit, purport and objects of BoR
- ***Sec 36(1)*** – allows rights in BoR to be limited by law of general application (including customary law), provided that such limitation is reasonable and justifiable in an open and democratic society

If it is accepted that application of customary law is a constitutional right, in event of conflict, rights must be balanced against each other

INTRODUCTION TO CUSTOMARY LAW OF PERSONS

Family unit in customary law is the household (“kraal”). Family group of each wife forms a house. Whenever a man has more than 1 wife, there are 2 or more houses in a kraal

The legal subject in indigenous law

Legal subject: bearer of rights and duties

Original indigenous law recognised only natural persons as a legal subject, not juristic persons

(Original indigenous law – prior to Black Admin Act 1927)

Individual shared rights, powers and duties with agnatic group. Individual’s share in rights of the agnatic group depended on his/her status within the group

Agnatic group not a juristic person because individual members did not have rights, powers and duties independent from the group. Also, agnatic group did not have rights, powers and duties independent from members

Individual’s status within agnatic group influenced by age, sex, marital status, legitimacy, adoption, disinheritance, family and house rank and mental state.

Head of agnatic group held highest rank within the group. In original indigenous law, only men could hold this position. Head had certain powers distinguishing him in a significant way from other members of group. However, he did not form a separate entity from the group.

In **modern indigenous law**, the **emphasis is on the individual person as a human being**. Individual is bearer of rights, powers and duties. Within context of the agnatic group, the individual is independent of the other members.

Head of group regarded as person in whom group’s rights are vested – head is therefore regarded as owner of group’s assets. **However, individual should not be separated from group as this may lead to injustice** – undermining rights and privileges of other members of group

Status – linked to a person’s legal position or standing and determines a person’s powers.

In **original indigenous law**, the individual shared his/her rights with other members of the agnatic group. The individual’s share in the rights depended in his/her status within the group. This status again was influenced by factors such as family rank, house rank, age, sex, etc.

Status	Rank
Determines powers derived from objective law	Just one factor which may influence a person’s status

Principle of shared rights meant no question of absolute majority/minority. In original indigenous law, idea of fixed age at which person attained majority unknown. The higher a person’s status, the more powers he/she obtained

In **modern indigenous law**, person’s status influenced strongly by specific age (18) at which majority is attained

Some factors influencing status:

1.) **Age**

In **original indigenous law**, minority and majority unknown. No person was altogether a minor. Even a newborn baby shared in rights, powers and duties of agnatic group.

Age not without legal significance:

Under 6 years	Child cannot be held accountable
Reached puberty	Can get married
Mental immaturity	Not qualified to succeed to position

More important than age was **physical development**. Puberty strongly emphasised – initiation ceremonies. Person considered an adult and marriageable after undergoing these ceremonies

In **modern indigenous law**, majority now attained at 18. Effect of majority: individuals become majors and obtain rights, powers and duties independent of agnatic group

2.) **Sex**

In **original indigenous law**, only males could succeed to positions of status. Women could not become family head or succeed to general or house property.

In **modern indigenous law**, position of female influenced by majority. Sec 9 of constitution and sec 6 of Equality Act prohibit discrimination. Position regarding succession of females must change

3.) **Rank**

Family rank	House rank
Hierarchy of members within family group	Hierarchy of various houses that make up household

a.) **Family rank**

- Males occupy higher rank than females
- Principle of primogeniture: eldest son holds higher rank than his younger brothers
- Twins – conceptions among various indigenous African groups vary. For some, first born considered elder; for others, last born
- Within broader family group. Rank of children qualified by father’s rank within family of origin. If father eldest brother, his children hold higher rank

b.) **House rank**

- Consequence of polygyny – each wife and her children form separate house in household

- Various houses each hold a particular rank
- Basis of ranking differs among tribes:
 - ✚ For some, rank determined by who married first (first wife = main wife)
 - ✚ In some cases, main wife comes from particular descent group
 - ✚ Nguni have complex ranking system: household divided into sections and house rank determined by section it is in
- Rank of children depend on rank of house. Children of main wife rank higher than children of other wives, regardless of age

NATURE AND CHARACTERISTICS OF CUSTOMARY FAMILY LAW AND THE LAW OF MARRIAGE

Scope and nature of customary family law

- Consequences of marriage
 - ✚ **Relationships between people**
 - Husband and wife
 - Parents and children (guardianship)
 - ✚ Consequences concerning family property: **Patrimonial consequences**
 - ✚ Additional (due to polygyny): **legal relations between composite houses**
- Property either house or general property
- Component families constitute agnatic group. However, each family within agnatic group has certain rights and powers it can exact/protect from other houses in same household
- Houses can become involved in contractual relationships with each other
- Houses cannot oppose each other in lawsuit. Head of family (husband) cannot go against himself
- Agnatic group cannot be divided against itself
- Conflict – wider family group settles dispute

Nature & characteristics of customary law of marriage

- Distinction made between:
 - ✚ Traditional indigenous marriage (TIM)
 - ✚ Customary union (CU)
 - ✚ Customary marriage (CM)
- Prior to 1999, indigenous marriage not formally recognised as a marriage
- 15 November 2000, Recognition of Customary Marriages Act 120 of 1998 came into operation.
- Prior to this Act, only TIM and CU
- CM is modern version of TIM
- Rural areas – marriage concluded with TIM in mind. In event of dispute, indigenous courts adjudicate in terms of rules and concepts of TIM. HC or divorce court apply rules of CM

Traditional indigenous marriage

- Features:
 - ✚ Polygynous

- ✚ Does not concern 2 persons, but rather 2 family groups. Consequently:
 - 1.) Death does not dissolve marriage
 - 2.) In case of deficiency in spouse (e.g. infertility), person from family group may be substituted
- ✚ Accompanied by delivery of marriage goods (*lobolo*) by man's agnatic group to woman's agnatic group
- ✚ Procreation of children, particularly male children, of great importance (ensure ancestors taken care of in afterlife)
- ✚ Process of growth, rather than a legal transaction which comes into being at a specific time
- ✚ Creates a legal unit – family/ house which develops into a household
- ✚ Change in status – more powers

Requirements:

- ✚ No fixed age requirements
- ✚ Certain degrees of kinship forbidden
- ✚ Serious mental illness = unfit for marriage
- ✚ Impotence and serious physical defects could be substituted for by most groups, but recognised as grounds for dissolution

Customary union

- Prior to commencement of Recognition of Customary Marriages Act 120 of 1998, CU was the statutory recognised version of TIM
- Did not replace TIM which still exists in rural areas
- Definition: *the association of a man and a woman in a conjugal relationship according to Black law and custom, where neither the man nor the woman is party to a subsisting marriage* (sec 35, BAA 1927)
 - ✚ “subsisting marriage” = civil marriage
 - ✚ Shows that CU recognised as a “marital union”, but not as a “marriage”
- All valid CUs have been converted to CMs
- Since 1985, CUs in KwaZulu-Natal have been recognised as CMs in terms of KwaZulu Act
- Registration of CM compulsory in KwaZulu-Natal in terms of sec 45 of Codes of Zulu Law

Customary marriage

- Definition: *a marriage concluded in accordance with customary law* (sec 1(iii), **Recognition of Customary Marriages Act 120 of 1998**)
- Act came into effect on 15 November 2000 and distinguishes between CMs validly in existence before this date and those entered after this date
- Sec 2(1): *A marriage which is a valid marriage at customary law and existing at the commencement of this Act is for all purposes recognised as a marriage*
- Sec 2(3): *If a person is a spouse in more than one customary marriage, all valid customary marriages entered*

into before the commencement of this Act are for all purposes recognised as marriages

- Validity of CMs entered into prior to Act should be determined in terms of requirements *back then*
- CMs entered into after Act must meet requirements of Act
- Sec 2(2): *A customary marriage entered into after the commencement of this Act, which complies with the requirements of this Act, is for all purposes recognised as a marriage*
- Sec 2(4): *If a person is a spouse in more than one customary marriage, all such marriages entered into after the commencement of this Act, which comply with the provisions of this Act, are for all purposes recognised as marriages*

(Legal requirements discussed in a subsequent chapter)

THE BETROTHAL IN CUSTOMARY LAW

Nature of the legal act

In **original indigenous law** betrothal is agreement between 2 family groups with regard to a future marriage.

- 1.) Agreement
- 2.) Delivery of all or some of marriage goods

Not all indigenous groups recognise the betrothal as an independent legal act if the agreement and transfer of the marriage goods and transfer of the woman all take place within a single ceremony which stretches over a few days

In **modern indigenous law**, parties are individuals (man, girl and girl’s father). If man still a minor, he has to also be assisted by his father.

- Betrothal agreement does *not* create an enforceable right or obligation to marry
- Betrothal agreement can be repudiated/terminated at any time without aggrieved party being able to demand compensation on grounds of breach of K
- Legal consequences of termination of betrothal restricted to patrimonial aspects

Consequences of betrothal

- Woman should not pay attention to other men
- Man must not neglect her (due to polygyny, he may pay attention to other women as long as he does not neglect his betrothed)
- Delivery of betrothal goods

Betrothal gifts	Marriage goods
e.g. blankets, clothing, other household goods	e.g. cattle or money
Upon delivery, property rights transferred	Ownership remains vested in giver until marriage concluded
If betrothal terminated, articles not automatically returned. Guilt determining factor	If betrothal terminated, must be returned to man’s family group

Termination of betrothal

- 1.) Death of man/woman
- 2.) Mutual agreement
- 3.) Unilateral termination

Death does not automatically terminate betrothal. Various peoples (Pedi, Venda, Tswana) provide for substitution.

Mutual agreement between man and woman unlikely. Woman’s father also a party to agreement. In *original* indigenous law, *family groups* had to agree to terminate

Unilateral termination with or without good cause.

- **Good cause for man’s group:**
 - ✚ Unreasonable postponement of marriage
 - ✚ Woman’s misconduct with other men and neglect of betrothed
 - ✚ Woman’s immorality. If man condones, cannot terminate with good cause
 - ✚ Physical injury incurred by man rendering him unfit for marriage – must compensate woman’s group for expenses incurred
- **Good cause for woman’s group:**
 - ✚ Man marries someone else during betrothal period
 - ✚ Man’s immorality where monogamous marriage contemplated provided woman does not condone
 - ✚ Continuous neglect
 - ✚ Too much attention paid to other women and neglect of betrothed and her family

Where woman’s group terminates, **Mehlomakulu v Jikejela** established the following principles:

- 1.) Woman alone decides whether she wishes to terminate; guardian has no say
- 2.) Woman alone decides whether she wishes to reject the man or condone his misconduct
- 3.) Condonation/rejection by guardian without woman’s agreement has no effect

Consequences of termination

Death

- Marriage goods returned
- Compensation paid for losses of cattle only if these had not been reported in good time (woman’s group has duty to care for cattle and report losses)
- Where man has caused woman’s death, goods are not returned (e.g. man made woman pregnant during betrothal and she died during labour)

Agreement – parties usually also come to an agreement regarding disposal of goods. Usually returned

Unilateral termination

- Zulu: marriage goods returned regardless of which party brought about termination

- Others: guilt factor plays a role
 - ✚ Man terminates with good cause: returned
 - ✚ Man terminates without good cause: man forfeits goods already delivered
 - ✚ Woman terminates with good cause: man forfeits goods already delivered

LEGAL REQUIREMENTS FOR CUSTOMARY MARRIAGE

Absolute requirements	Relative requirements
Must be satisfied beforehand	Compliance may be later
If not met, no juristic act (null and void <i>ab initio</i>)	Valid juristic act may be effected*
Arise from law; cannot be excluded/amended by mutual agreement; unalterable	Parties can mutually agree to alter these requirements to suit circumstances

*such juristic act can be fulfilled by satisfying deficient requirements at later stage/ terminated by failure to do so

Legal requirements for customary marriages entered into before 15 November 2000

- Before: same as legal requirements for TIM/CU
- After: sec 3, Customary Marriages Act 120 of 1998
- Act confers legitimacy on polygyny

Legal requirements for TIM

- Absolute requirements:
 - 1.) Man and woman must not be related to one another within the prohibited degrees of **kinship**
 - 2.) **Consensus** between 2 family groups regarding:
 - a.) 2 **individuals** to be united in marriage
 - b.) **Marriage goods** which must be delivered
 - 3.) **Bride must be transferred** by her family group to the man's family group
 - 4.) **Woman not already involved in a marital union**
- Ceremonies has value as proof but not legal reqts
- Absence of age reqts

Kinship

- Incest pollutes and defiles community
- If incest occurs there may be supernatural punishment from ancestors (droughts, etc)
- Offending parties must be killed or undergo purification ceremonies to free community

Consensus between 2 family groups

- Individuals cannot agree on behalf of group
- Customary ways in which young man and woman attempt to force family groups to agree to marriage
 - ✚ Elopement (Zulu: *ukubaleka*)
 - ✚ Kidnapping the bride (Nguni: *ukuthwala*)

Marriage goods (lobolo)

- Sec 1(1), Codes of Zulu Law: *cattle or other property which, in consideration of an intended customary or civil*

marriage, the intended husband, his parent or guardian or other person agrees to deliver to the parent or guardian of the intended wife.

- Sec 1(iv), Recognition of Customary Marriages Act: *property in cash or kind... which a prospective husband or the head of the family undertakes to give to the head of the prospective wife's family in consideration of a customary marriage*

Requirements for lobolo contract:

- 1.) Consent of father/guardian of bride-to-be
- 2.) Consent of bride (in modern indigenous law)
- 3.) Consent of bridegroom (in modern IL)
- 4.) Transfer of bride effects marriage
- 5.) Transfer of lobolo (practice varies among groups)
 - a.) Fokeng, Mogopa: all marriage goods must be delivered *before* transferring bride
 - b.) Other: part must be delivered before transfer
 - c.) Tswana: marriage goods delivered from marriage goods received in future from her daughter's marriage
 - d.) South Nguni: *ukuthleleka* – wife's people impound her from time to time until husband delivers more marriage goods to free her

Transfer of bride

- Need not take place physically but there must be a formality of some kind
- Bridegroom need not personally be present (transfer is to his family group)
- For some groups, sufficient if bridegroom allowed to sleep with bride

Pre-existing marital union

- Only a requirement for woman due to polygyny
- If woman already married, marriage null and void

Legal requirements for a CU in KwaZulu-Natal

- Sec 38(1) of Codes of Zulu Law:
 - 1.) Consent of bride's father/guardian if still a minor, which consent must not be unreasonably withheld
 - 2.) Consent of bridegroom's father/family head, if bridegroom still a minor
 - 3.) Public declaration by bride to official witness that union takes place with her consent
- Code further says that CU must be registered but failure does not render union null and void
- With conclusion of CU, parties to lobolo contract are bridegroom and person entitled to lobolo – lobolo, in this instance, is a separate contract

Legal requirements for CU outside KwaZulu-Natal

- Olivier:
 - 1.) Consent of bridegroom's father in certain circumstances (if bridegroom is a minor)
 - 2.) Consent of bridegroom
 - 3.) Consent of bride's father

- 4.) Consent of bride
- 5.) Handing over of girl to man/his group
- 6.) Agreement that lobolo will be delivered
- 7.) Non-existence of a common-law (civil) marriage

Legal requirements for customary marriages entered into after 15 November 2000

- Sec 3, Recognition of Customary Marriages Act 120 of 1998:
 - 1.) Prospective spouses must both
 - a.) Be above the age of 18 years, and
 - b.) Consent to be married to each other
 - 2.) Marriage must be negotiated and entered into or celebrated in accordance with customary law

Age requirements

- Act makes provision for CM of minors:

Sec 3(3): (a) *If either of the prospective spouses is a minor, both his or her parents, or, if he or she has no parents, his or her legal guardian, must consent to the marriage*

(b) *if the consent of the parent or guardian cannot be obtained, sec 25 of the Marriage Act, 1961, applies* (commissioner of child welfare may grant consent)

Sec 3(4): (a) *...Minister (of Home Affairs) or any officer in the public service authorised in writing thereto by him or her may grant written permission to a person under the age of 18 years to enter into a CM if the Minister/ said officer considers such marriage desirable and in the interests of the parties in question.*

x x x

(c) *If a person under the age of 18 years has entered into a CM without written permission of Minister or relevant officer, Minister or officer may, if he/ she considered the marriage desirable and in the interests of parties in question, and if the marriage was in every other respect in accordance with this Act, declare the marriage in writing to be a valid customary marriage*

Sec 3(5): *Subject to subsection (4), sec 24A of the Marriage Act 1961 applies to the CM of a minor entered into without the consent of a parent, guardian, commissioner of child welfare or judge, as the case may be* (application for annulment must be brought by parent/ guardian/minor personally with HC within prescribed time limits, before minor reaches 21 or 3 months thereafter)

Consensual requirements

- Both prospective spouses must consent
- Prevents forced marriages
- Also in line with equality clause of consti

Negotiation and celebration in accordance with customary law

- Differs from group to group
- Generally, family groups must negotiate and consent to 2 individuals being united and to delivery of lobolo – **this indirectly rendered lobolo a requirement for CM**
- Some groups also require physical transfer of bride

Relationship between civil and customary marriages

- Act regulates relationship between customary and civil marriages

Sec 3(2): *save as provided in sec 10(1), no spouse in a CM shall be competent to enter into a marriage under the Marriage Act 1961 during the subsistence of such CM*

- This does not prevent husband and wife in a monogamous CM from converting their marriage into a civil marriage

Sec 10(1): *a man and a woman between whom a CM subsists are competent to contract a marriage with each other under the Marriage Act 25 of 1961, if neither of them is a spouse in a subsisting CM with any other person*

- Legislature’s intention was to avert situations which existed previously. Before 1998, where a person concluded a CM and subsequently entered into a civil marriage with someone else, CM was automatically dissolved and woman and children automatically discarded! However, material rights of discarded wife were protected by BAA. If civil marriage first, subsequent CM null and void. Wife in void CM enjoyed no protection under the law.

Registration of CM

- Previously, only CM in KwaZulu-Natal had to be registered
- Act now makes provision for registration of all CM
- Failure, however, doesn’t affect validity of marriage
- Registration merely provides proof of CM

CONSEQUENCES OF CUSTOMARY MARRIAGES

General consequences

- 1.) New and separate unit (family/house) comes into being. This unit is also a legal unit
- 2.) Husband and wife have a mutual obligation to live together. Some groups allow woman to live with eldest son once he occupies his own residence
- 3.) Husband and wife have mutual duty to allow sexual intercourse
- 4.) Status of man and woman changes
 - ✚ Powers of woman’s group in respect of guardianship over her are transferred to husband and his group
 - ✚ Children under guardianship of husband and his family
 - ✚ Wife enjoys considerable amount of independence in own house but must consult with husband on impt matters
 - ✚ Husband, as family head, has specific powers – represents family in external matters; responsible for order and discipline within family and for its needs and interests

Husband’s wider family also have measure of control over property. This meant wife protected against mismanagemt

Personal consequences

- Each wife in a polygynous TIM and CU occupies a particular rank within the greater composite household. Her rank influences her status, her relationship with her husband's other houses and her children's rights to succession

Simple ranking system

- Only found among those Tsonga groups that have not been influenced by the Zulus
- No married woman establishes a house
- Woman who marries man first becomes main wife
- All other wives ranked in order of marriage
- Husband has control of property as a whole
- At husband's death, eldest son of main wife assumes control of common property
- Wives and children have claim to maintenance from common property
- Household means are not divided

Complex ranking system

1.) Household divided into sections

- Southern Nguni
- 2 or 3 sections
- First 2 women a man marries become main wives of 2 sections. All further wives are added to these sections as subordinate wives
- First wife = main wife; her house = great house
- 2nd wife forms the right-hand house
- All further wives known as "rafters" and added in turn to great house and right-hand house
- Each house separate legal unit with own property
- Rafter house subordinate to main house of section

2.) Household not divided into sections

- Sotho-Tswana
- Gen. rule: first woman married becomes main wife
- Except: preferential marriage
- Rank of wives det acdgd to order of marriage
- Each wife est separate house with own property

*seed-raiser wife = substitute; doesn't form separate house

Relationship between husband and wife

- In TIM and CU (outside KZN), wife under guardianship of husband – like a minor
- Repealed by RCM Act 120 of 1998: wife no longer under guardianship of husband, but also major

Sec 6: *a wife in a CM has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers she might have at customary law*

Proprietary consequences

- TIM and CU create separate house estate
- Except: Tsonga who have not come under influence of Zulus

Control over house property

- House property belongs to husband, wife of the house and their children – all share in property and each have duty to contribute
- Husband controls property on behalf of house, but in consultation with wife and children
- CU – individuals seen more as individuals, each with particular rights and powers. Husband only person who can dispose of house property. Children who have attained their majority earn their own living and have estate separate to house. Married woman has no legal control over house property. Unlikely that her original rights of disposal over house property would be recognised under modern law. However, where husband irresponsibly disposes of house property and ignores wife's objections, she can institute action against him on behalf of her house

Relationships between houses

- Original indigenous law: property of every house forms a separate unit
- Codes of Zulu Law compels family head to keep property of his houses separate
- Gen rule: one house may not be enriched at cost on another house
- Property used to benefit another house:
 - 1.) Reasonable and for a just cause
 - 2.) Family head must consult members of house
- Instances where such transfer allowable:
 - ✚ House has to repay a debt and does not have necessary property to do so
 - ✚ Property of one house used as marriage goods for a son of another house. Daughter from latter house is usually appointed as source from which debt to be repaid
 - ✚ House property used to marry a subordinate wife. Such a wife usually affiliated to house that supplied the property
- Transfer of property from one house to another results in a debt relationship between 2 houses
- Death of family head does not extinguish debt
- Previously, houses could not sue each other
- In modern indigenous law, woman can initiate claim on behalf of her house

Reform under the Recognition of CM Act

- Sec 7(1) of RCM Act 120 of 1998 provides that proprietary consequences of CM entered into before commencement of Act continue to be governed by customary law (sep. houses with own house property in polygynous marriages retained)
- Sec 7(2): monogamous CM entered into *after* commencement of Act results in a family estate that is in community of property and of profit and loss unless antenuptial contract provides otherwise
- Sec 7(1) & (2) proposes differential treatment

Gumede v Gumede: held that this was unfair discrimination of women in “old” CM. Provisions declared unconstitutional and invalid. Effect: proprietary consequences of marriages entered into before and after the commencement of Act now enjoy same status – both community of profit. Both spouses in CM, irrespective of when they were concluded, have equal control of property

CM further reformed by application of **Matrimonial Property Act 88 of 1984** which gives equal powers to husband and wife to administer and control joint estate in CM which is in community of property

In a polygynous CM, where husband intends to enter into further CMs with other women, Act states that husband must apply to court to approve written contract regulating future matrimonial property system of his marriages

DISSOLUTION OF CUSTOMARY MARRIAGES

Husband and wife cannot dissolve marital union alone. TIM – family groups. CU – plus wife’s father/his successor

TIM was concluded without any state involvement and also dissolved without state interference – matters of private law
- Same for CU outside KZN

In KZN, govt appoints official witness who should be present at celebration of CU (Codes of Zulu Law). CU in this province can only be dissolved by a court

RCM Act 120 of 1998: CM can only be dissolved by court

Ways of dissolution

1.) **Court action**

✚ **TIM** – court only involved when families couldn’t agree on consequences of dissolution

✚ **CU** – In KZN, must be dissolved by competent court. Outside KZN, not compelled to institute court action. Parties may approach court to decide on return of marriage goods. Court approached for *declaration* that CU dissolved

✚ **CM** – RCM Act 120 of 1998 provides that *only* competent authority to dissolve CM is a court (family court/HC/divorce court)

2.) **Outside the court** – In original indigenous law, TIM dissolved by family groups. This principle recognised in modern indigenous law for CUs outside KZN. Possibilities:

✚ Mutual agreement between parties. Need not be grounds. Agreement usually also provides for consequences

✚ Husband’s initiative – with or without good reason

✚ Wife and father’s initiative – with or without good reason

3.) **Death**

✚ **TIM** – didn’t dissolve marriage. Substitute

✚ **CU** – in modern indigenous law, death of wife terminates CU, though substitution also possible. House of deceased wife continues to exist. If no son, husband may marry “seed-raiser” in her place. Death of husband does not dissolve CU. Widow remains wife of household. Male relative could procreate children with her for deceased

✚ **CM** – not clear. Sec 8 of Act provides only for dissolution by a decree of divorce. Can be argued that since there is no explicit amendment of customary law, it still applies – death doesn’t terminate marriage

Grounds for dissolution

- Traditionally, divorce unknown
- No fixed grounds for dissolution
- Any party could dissolve even without reason
- Did have effect on marriage goods – if husband dissolved on good grounds, returned. If husband dissolved without good grounds or wife’s group has good grounds, husband forfeited goods

Original indigenous law

- 1.) Non-fulfilment of wife of child-bearing duties; substitution possible here
- 2.) Failure to deliver marriage goods (note: wife’s group usually very patient with this)
- 3.) Continual violation of conjugal fidelity by wife, amounting to repudiation; attempts by wife to prevent husband from taking action against her lover; single act of incest by wife
- 4.) Premarital pregnancy concealed from husband
- 5.) Neglect of mutual marital duties, incl. sex
- 6.) Expulsion of wife by husband
- 7.) Desertion by wife with persistent, unfounded refusal to return
- 8.) Accusations of witchcraft by husband against wife
- 9.) Impotence of husband (substitution possible)

Modern indigenous law

- 1.) Adultery, but only if it amounts to repudiation or renders union impossible. Protection of lover/incest aggravating circumstances (no longer separate grounds)
 - 2.) Pregnancy during marriage resulting from secret premarital intercourse with another man
 - 3.) Desertion by wife
 - 4.) Refusal to have sexual intercourse
- In KZN, accdg to Codes of Zulu Law, both husband & wife:
- 1.) Adultery
 - 2.) Continued refusal of conjugal rights
 - 3.) Wilful desertion
 - 4.) Continued gross misconduct

- 5.) Imprisonment for at least 5 years
- 6.) Condition rendering continuous living together of spouses insupportable and dangerous

In addition, wife may dissolve on following grounds:

- 7.) Gross cruelty/ill-treatment by husband
- 8.) Accusations of witchcraft or other serious allegations made against her by husband

Customary marriage

- Sec 8(1): CM can only be dissolved on ground of ***irretrievable breakdown of the marriage***
- This is in line with existing, living customary law, prov not only the views of the spouses, but also the views of the wider family group are taken into account when det fact of irretrievable breakdown
- Sec 8(2): in order to grant decree of divorce, court must be satisfied that marriage has reached such a state of disintegration that there is no reasonable prospect of restoration of normal marriage relationship between the spouses
- Question of fact: relevant facts and circumstances
- Court's discretion but if defendant doesn't challenge, little option but to accept

Effect of dissolution on marriage goods

- Either returned or forfeited (may be in part)
- Various groups differ but following factors usually taken into account:
 - 1.) Amount of blame on either side
 - 2.) Number of children born of the marital union
 - 3.) Portion of marriage goods already delivered

Amount of blame on either side

- Party who is to blame forfeits marriage goods
- Customary to return at least 1 beast to indicate in concrete manner that marriage dissolved

Number of children born

- For most groups, 1 beast allowed for every child the wife has borne (incl. miscarriages)
- Should wife have more children than marriage beasts, at least 1 beast should be returned to husband as concrete proof of dissolution

Portion of marriage goods already delivered

- If husband has not delivered all marriage goods and he is responsible for breakdown, he is indebted for the balance
- Should parties fail agree re marriage goods, court may be approached. In such case, court not asked to dissolve union. *Union already dissolved*. Court merely asked to decide on marriage goods

Consequences of dissolution

- Marital union terminated
- Position in customary law differs from SA law

Consequences for husband and wife

- Man's status not seriously affected
- Wife's position changes drastically – divorced woman; no longer under husband's guardianship
- Original indig law: woman reverted to being under guardianship of her agnatic group of birth
- Wife in CU also reverts to guardianship of father or his successor unless she is above 21
- Sec 6 & 9 of RCM Act 120 of 1998, wife in CM is a major and remains a major after dissolution

Consequences for the children

- Wife's house not dissolved
- Orig ind law: children remained members of house. Infants could accompany mother to her people, but had to be returned when older
- Codes of Zulu Law: CU: children under guardianship of husband. Court may make an order regarding their custody and maintenance
- Parental rights det by lobolo – if lobolo paid, husband and family entitled to children
- RCM Act 120 of 1998: court makes order
- Court has adapted customary law by emphasising best interests of the child
- Guardianship act 1993: grants equal powers of guardianship to both parents of a minor child

Proprietary consequences

- House continues to exist
- Wife lost all rights and powers in respect of house property. Could not claim maintenance
- RCM Act 120 of 1998 provides for maintenance and matrimonial estate sharing
- Sec 9, Divorce Act: *no person ought to benefit from a marriage which he/she has caused to fail.*
- RCM Act 120 of 1998: court must make equitable order re polygynous marriages

CUSTOMARY LAW OF PROPERTY

In orig indig law, agnatic group (or house subdivision of agnatic group) was bearer of rights. Head of group exercises right on behalf, and in interests, of agnatic group

What are the distinctive characteristics of orig indig law of things?

- Agnatic group (and house) bearer of rights
- Property rights limited to ownership of movable and immovable things
- Individual ownership unknown

In modern indig law, real rights also vested in individuals

Categories of property

- 1.) General property
- 2.) House property
- 3.) Personal property

General property belongs to household as a whole. Controlled by family head but he is not personal owner of property. Each member of household shares in property according to his/her status within the group. Family head exercises control on behalf, and interests, of group.

General property includes:

- ✚ Property of family head's mother's house
- ✚ Property which family head has earned
- ✚ Land allocated to family head by tribal authority and which has not been allotted to a particular house

On death of family head, control of general property passes to head's general successor

House property refers to property that belongs to each separate house (among Tsonga uninfluenced by Zulu, house property unknown). Controlled by head of house (husband) who may be head of several houses. In disposing house property, he is morally (but not legally) obliged to consult wife of house and house successor (if adult). Wife has reasonable degree of control over house property as far as daily household affairs are concerned.

House property includes:

- ✚ Earnings of family members
- ✚ Livestock allocated to particular house
- ✚ Property given to woman on her marriage (household utensils/Nguni: *ubulungu* beast)
- ✚ Marriage goods received for daughters of house
- ✚ Compensation for wife's adultery/seduction of any of the daughters of house
- ✚ Crops from fields belonging to house
- ✚ Land allocated to house for dwelling & cultivation

Wife of house can protect house property in case of husband's prodigality. She can call on husband's agnatic group, and today, can also apply to magistrate

On husband's death, control of house property passes to house successor (wife's eldest son) - doesn't mean successor becomes owner of property to exclusion of others

Who is responsible for the control of general and house property?

- General property controlled by family head, in consultation with senior men and women of agnatic group
- House property controlled by family head in consultation with wife and senior children

Personal or individual property – property that belongs to a person who has acquired it, although it may be under the control of the family head

Originally, personal property unknown in customary law. Had to consult with other members of agnatic group

In modern indigenous law, individual ownership acknowledged. Here, rules governing property essentially same as those generally applicable in SA law. In individual's use of property, morally (but not legally) obliged to consult family head. Individuals may dispose of property as they wish

CUSTOMARY LAW OF SUCCESSION AND INHERITANCE

Inheritance	Succession
Division of assets of deceased among heirs	No division of property. Successor takes place of deceased and gains control over property and people
Should liabilities exceed assets, heirs inherit nothing	Successor succeeds to assets AND liabilities. Should liabilities exceed assets, successor succeeds to these as well*

*this differs among various groups

Customary law of succession

General principles

- Succession takes place on death of predecessor; there is no question of succession while family head still alive
- In original indigenous law, succession related solely to status, but modern indigenous law does acknowledge notion of individual inheritance of property
- In original indigenous law, no such thing as total disposition by means of will. Today, not uncommon
- Distinction between general succession and special/house succession
- Original indigenous law, successor succeeded to assets and liabilities. In modern indigenous law, differs between groups
 - ✚ KZN – succeeds only to those debts that emanate from marriage contracts (*lobolo*)
 - ✚ Rest of SA – all debts
- Succession in status limited largely to males
- Principle of primogeniture (firstborn son)
- Succession = duty that can't be relinquished/ceded
- Male descendants enjoy preference to male ascendants; male ascendants preferred over collateral relatives
- Disposal among living possible, provided formalities
- Successor may, on good grounds, be removed from line of succession (disinherited)

General order of succession

- Principles:
 - 1.) Succession through death
 - 2.) Primogeniture
 - 3.) Succession by males in male line

Succession in monogamous household:

- 1.) Eldest son or, if he is deceased, his eldest son
- 2.) If eldest son died without male descendants, 2nd son or his male descendants in order of birth
- 3.) Deceased has no male descendants/survived them, deceased's father
- 4.) If survived all male descendants and father, his eldest brother of his male descendants
- 5.) Grandfather of deceased or his male descendants according to seniority
- 6.) Great-grandfather and his male descendants

- 7.) Traditional ruler
- 8.) President as supreme chief

Succession in a polygynous household

- Eldest son in each house succeeds in that particular house
- If he is deceased, his male descendants
- Then younger brothers and their descendants
- Should a house have no male descendant, successor obtained from house next in rank
- Among peoples whose household is divided into sections, attempt first made to obtain successor from houses affiliated to main house within a section before considering next section

Order of succession among male children:

- 1.) Legitimate son
- 2.) Illegitimate son by virgin, widow/ divorced woman for whom maintenance (*isondlo*) paid
- 3.) *Ngena* children
- 4.) Adopted/adulterous children of wife (unless she has been repudiated) in chronological order in which they became attached to family
- 5.) Sons of widow not born out of an *ngena* union
- 6.) Premarital son of unmarried woman or extramarital son of divorced woman for whom no *isondlo* paid. (Succession through a woman – can only occur if no other male relatives)

General and special succession

General succession	Special succession
Succession to position of family head	Succession to position of head of a house
Control over household and property of general estate (property belonging to agnatic group as a whole)	Control over house and house property

Powers and duties of the successor

- Powers and duties passed on in more or less direct proportion to rank of each house
- Each house successor had considerable autonomy
- Had to care for and support house members, see that debts were paid and collected and provide marriage goods for sons
- General successor same but also acted in place of deceased family head and obtained control over general property – responsible for general debts of household and could collect outstanding debts
- KZN: generally liable only for debts equal to assets. Except: *lobolo* debts/interhouse loans
- Outside KZN: universal succession
- Successor also liable for delicts of deceased – limited to cases where action instituted before death of deceased or where deceased accepted liability during lifetime. Limited to extent of estate

Disposition *inter vivos*

- Family head could make certain allotments during his lifetime which would remain valid after death
 - ✚ Allotment of property to spec house/ son
 - ✚ Adoption (except Zulu and Swazi)
 - ✚ Transfer of younger son from one house to another house without a son
 - ✚ Seed-raising
 - ✚ Allocations of daughters to sons in a house as a means of providing for marriage goods of these sons
 - ✚ *Ukungena* – procreation of successor for a deceased man by his widows
 - ✚ *Disinheritance* (“disherison”)

All above methods have definite influence on customary rules of succession. Must be accompanied by formalities and done in consultation with wider family group

Statutory regulation of customary law of inheritance

Testamentary dispositions

- In orig indig law, total disposition of property by means of a will unknown. Main reason: rights and duties held by agnatic group
- In modern indig law, wills recognised
- Black Administration Act (1 Jan 1929): all movable property allocated to a house/wife in a CM was inherited accord to rules of orig ind law and could not be bequeathed by means of a will. All other property could be disposed in a will
- Civil marriage/unmarried man/all women can dispose of their whole estate by means of a will

Intestate inheritance

- **Bhe case:** inheritance under customary law (BAA) declared unconstitutional
- Reform of Customary Law of Succession Act: Intestate Succession Act now applies
- **Moseneke:** declared differentiation in sec 23(7) BAA and regulation 3(1) unconstitutional. Brought era of racial discrimination in administration of deceased estates in SA to an end
- **Zondi:** regulation 2 unconstitutional to extent that it distinguishes, for purposes of intestate succession, between estate of African in community of property marriage and estate of African in marriage out of community of property

Challenges to sec 23 of BAA and regulations

- **Bhe:** Sec 23 which affords recognition to principle of male primogeniture declared unconstitutional. It excluded women/extra-marital children from inheriting. Rights to equality and human dignity
 - ✚ Declaration of invalidity retrospective to 27 April 1994. Except: completed transfer of ownership unless est that transferee had notice of challenge

Legal reform

- **Reform of Customary Law of Succession Act 11 of 2009** reaffirms that Intestate Succession Act will be applicable to all estates.
- Sec 2 provides for situations usually found in customary law:
 - + Spouse inherits same portion as child
 - + Regarded as descendant of deceased

JUDICIAL APPLICATION OF CUSTOMARY LAW

THE AFRICAN CUSTOMARY PROCESS OF NEGOTIATION IN DISPUTES

Negotiation and mediation in African customary law aimed at bringing about reconciliation between people who are engaged in a dispute. Means of settling dispute.

Phases in development of dispute:

- 1.) Grievance or latent-conflict phase – event experienced by party that is harmful
- 2.) Conflict phase – aggrieved party communicates aversion/feeling of being wronged
- 3.) Dispute phase – other party gets involved (e.g. apologies/denial)

In practice, dispute may not go through all 3 phases and may not go in that order

Procedures for handling disputes:

- Disregard, so grievance does not lead to conflict
- Avoidance – break off relations with other party
- Self-help – aggrieved party acts unilaterally
- Negotiation with view to reconcile
- Mediation – 3rd party involved as mediator
- Arbitration – 3rd party decision binding and enforceable
- Judicial adjudication – court settles dispute

Disregard, avoidance and self-help involve one party. Negotiation involves 2 parties. Mediation, arbitration and judicial adjudication involves 3 parties

Settlement of disputes within family groups

- Negotiation with view to reconciliation
- Mother/senior female figure reports dispute to head of family – private matter; meeting of adults
- If matter cannot be settled within family circle, senior relatives outside family invited to help
- Then assistance of direct neighbours
- Emphasis: restoring relations
- If meeting finds solution – wrongdoer reprimanded and required to “wash the wrong” (chicken/goat slaughtered and eaten – meal)
- If solution not accepted, local headman (head of lowest customary court) acts as mediator before making a formal judicial decision

Settlement of disputes between non-related family groups

- Negotiation
- If unsuccessful – headman’s court

If between husband and wife:

- 1.) Discussed with husband’s family circle
- 2.) Wife’s family invited to help
- 3.) No solution – may lead to termination of marital relationship without headman involved
- 4.) Reconciliation – conciliatory meal offered by party at fault

If dispute between non-related family groups:

- 1.) Aggrieved person discusses with own family
- 2.) If agreed that wrong had been done, matter reported to family group of wrongdoer (“throwing a kierie”)
- 3.) Wrongdoer’s group meet to investigate and discuss the complaint
- 4.) If clear wrong done, group sends representatives to offer apologies
- 5.) If accepted, matter resolved
- 6.) If no reaction from wrongdoer’s group, aggrieved group will again “throw the kierie” (repeated up to 4 times)
- 7.) Matter taken to court
- 8.) Negotiations may include headman-mediator
- 9.) Any stage parties come to an agreement, reconciliatory meal held

Changes

- Family groups often not functional today
- Local residential group takes place of extended family groups – neighbours play larger part in process of negotiation
- Urban areas – many strangers living close to each other. Reported to police, church groups or civil authorities

GENERAL PRINCIPLES OF CUSTOMARY COURT PROCEDURE

If act gives rise to both a civil and criminal action, both aspects dealt with in same hearing

Lodgement procedure

Civil case

- 1.) Plaintiff’s agnatic group first try negotiate with defendant’s agnatic group
- 2.) No agreement, plaintiff’s group reports to headman
- 3.) Headman sets a date for hearing and notifies defendant
- 4.) On day of hearing, parties and witnesses must be present. *Case may not be heard in absence of one of parties*

- 5.) If party cannot be present, postponed
- 6.) If unhappy with decision of headman's court, referred to chief's court (same procedure)

Criminal case

- 1.) Agnatic group of injured person reports case to local headman
- 2.) In exceptional cases, complaint lodged directly with chief's court
- 3.) Headman investigates matter and reports to chief
- 4.) Chief sets date for trial; parties notified
- 5.) Customary procedure applies *where it is not in conflict with public policy and natural justice*
 - Person may not be sentenced in his absence
 - Chief may not administer justice in a case in which he himself is the complainant

Trial procedure

- Main principles:
 - 1.) Onus is on accused to prove innocence in court
 - 2.) Sessions of courts held in public
 - 3.) All parties must be present during trial
 - 4.) No legal representation (but assisted by relatives)
 - 5.) Proceedings conducted orally

Today, a chief's court judgment must be registered with magistrate within 2 months, or else lapses

- 6.) Proceedings fairly informal but orderly manner
- 7.) No oath taken by parties /witnesses – no perjury
- 8.) Prescription of debt/claim unknown – plaintiff, however, compelled to submit claim without delay as it may make it more difficult to prove facts
- 9.) Court proceedings are inquisitorial in nature – court's duty to try establish truth through questioning and cross-examination

APPLICATION OF CUSTOMARY LAW IN THE COURTS

Sec 1, Law of evidence Amendment Act 45 of 1998: *all courts can apply African customary law in so far as such law is readily available and certain*

Sec 39(2) of consti makes provision for application and development of African customary law by courts as long as it accords with spirit and purport of Bill of Rights

Courts which can apply African customary law

- 1.) Constitutional court
- 2.) High court
- 3.) Magistrate's court
- 4.) Court of traditional leaders
- 5.) Small-claims court

Aggrieved party's choice initiate claim in CTL, MC or SCC

- CTL – appeal to MC then HC
- SCC – no right to appeal to MC

If customary law in conflict with BoR – HC, SCA, CC

Application in the magistrate's court

- 2 capacities:
 - 1.) Court of first instance – magistrate has choice: apply common law or African customary law
 - 2.) Court of appeal (from CTL) – may confirm, alter or set aside judgment = decision of MC; not ordinary appeal as could involve a re-trial

African customary law and the small-claims court

- Reasons:
 - 1.) Relieve pressure on MC
 - 2.) Obviate high cost of lawyers
 - 3.) Prevent delay in bringing case before courts
 - 4.) Psychological barriers litigants experience when dealing with formal tribunals
 - 5.) Barriers caused by poverty, ignorance and feelings of alienation

Hoexter commission: SCC attempt to reconcile parties and presiding officials could play a more active inquisitorial role

- Jurisdiction: restricted to hearing of small claims (currently set at R3000)
- Excluded from jurisdiction:
 - + Dissolution of CM
 - + Actions for damages for seduction and breach of promise to marry (these must be brought to MC)
- No legal representation permitted
- General rules of evidence not applicable
- Questioning of witnesses on inquisitorial basis (court takes active part)
- No requirement that commissioners should speak a Bantu language or that they should be proficient in African customary law

Would you say that the institution of the small claims court has solved the problem of black litigants in regard to access to the law?

While procedure similar to that of African customary law (informal, no legal representation), certain customary law matters cannot be dealt with by these courts (dissolution/seduction/breach of promise to marry). Further, commissioners not required to have special knowledge of African customary law. Although it is cheaper and more informal, doubtful whether it will satisfy the needs of the black litigant.

JURISDICTION IN THE COURTS OF TRADITIONAL LEADERS

African customary leader had *ex officio* powers to decide any matter which came before his court. BAA imposed a radical limitation. African customary leader referred to as "chief" or "headman". Constitution refers to them as "traditional leaders."

BAA: tradl leaders empowered to adjudicate civil and criminal cases provided Minister has granted them power

Unlikely that courts of tradl leaders will draw distinction between crim and civ matters as they are reqd to do by BAA and common law – tradl leader liable.

Only black people have access to CTL

- NOT UNFAIR DISCRIMINATION: it is general practice to limit institutions of a particular culture to the members of that cultural group
- Reasonable and justifiable limitation on law against discrimination; special measure
- Blacks have choice as to court in which they will institute action and not obliged to go to CTL

Jurisdiction in civil matters

- 1.) Arise from African customary law
- 2.) Instituted by black people against black people residing within his area of jurisdiction

Gqada v Lepheana: traditional leader empowered to deicide on *lobolo* claim arising from African customary marriage (marriage already dissolved).

Appeal – local MC (unless claim for less than R10 except important principle of law)

Jurisdiction in criminal matters

- 1.) Any crime in accordance with common law
- 2.) Any crime in accdance w/ African customary law
- 3.) Any statutory crime referred to by the Minister

Limitations:

- Crimes committed between black people in area under his control (residence; not grp membership)
- 35 offences excluded (no need to memorise), e.g.:
 - ✚ High treason
 - ✚ Murder
 - ✚ Culpable homicide
 - ✚ Rape
 - ✚ Robbery

Appeal – MC with jurisdiction in area which trial took place

- MC may hear new evidence (more like re-trial)
- Must continue to apply African customary law

AFRICAN CUSTOMARY LAW OF EVIDENCE

Nature

- Trials in African customary courts still governed by African customary law of evidence, provided not in conflict with principles of public policy and natural justice
- Appeal to MC – general SA law of evidence applies
- African customary law of evidence based on custom, not formal rules. Informal.
- 2 characteristics:
 - 1.) **Inquisitorial** procedure – court plays active part in examining parties and witnesses

- 2.) **Free system of evidence** – no evidence excluded: all evidence admissible and judged on its merits by court

Burden of proof and evidential burden

Burden of proof	Evidential burden	
Determines which party loses case if court does not have sufficient grounds to make finding on issue of fact	Party must prove its claims in court	
Such a situation inconceivable in customary law. Extrajudicial methods of proof known (diviner/ordeal by poison)	Civil Plaintiff's group must submit evidence to prove its claim	Criminal Onus on defendant to prove innocence (no concept of reasonable doubt)
In ACL, neither party has burden of proving case. Court takes active part in process of questioning		

Measure of proof

- Absolution from the instance unknown in ACL (dismissal of claim because it can't make a decision in favour of one of the parties on evidence)
- Court plays active part in questioning
- Any person present in court may submit evidence
- All evidence tested and weighed
- Aim: not to prove who is right and wrong but to determine the truth and reconcile the parties with each other and with court and community
- No specific test like that of a "reasonable man" etc
- Parties allowed to submit unabridged version

Evidential material and means

Evidence

- 1.) Direct evidence (evid of person who has seen/heard something directly) best form of evid. Not enough on its own; considered with other evid
- 2.) Circumstantial evidence used to supplement evid
- 3.) Hearsay evidence *admissible*
- 4.) Concrete evidential material has especially strong evidential value (clothing left with victim)
- 5.) Evidence in previous cases also considered
- 6.) Court can produce evidence
- 7.) Any person present in court may submit evidence

Open system of questioning – witness may be recalled at any stage and parties/court/person in court may conduct own questioning of parties/witnesses. A party/witness's refusal to answer a question will lead to an unfavourable conclusion, namely that the person is hiding something from the court

Admissions – accepted as proven.

- Made outside court - admissible

Judicial notice – court takes notice of known facts w/o requiring proof (e.g. cultural customs; animal behaviour)

Presumptions accepted until rebutted.

- Children of married woman are children of her husband
- Adult is mentally sound
- Person doesn't voluntarily give clothes to stranger
- Person does not voluntarily remain prostrate so that another person may hit him on the back
- Action is instituted without delay. Plaintiffs who fail to do so intend to harm opponents

Extraordinary evidential material

- In former times, assistance of a traditional healer
- If facts difficult to prove, parties sent to healer – extrajudicial means such as throwing of bones or other tests determined guilt
- Finding accepted as decisive evidence in court

Competence to give evidence or to testify

- Gen rule: *all* persons (except insane/intoxicated)
- Even young children and co-accused
- Drunk people given time to sober up – postponed
- Wife may testify for/against husband & vice versa
- Chiefs/headmen/members of court council may not act as witnesses. However, they do not have to withdraw from case if they know something. They must convey their evidence to court

Giving evidence

- Not under oath. Perjury unknown
- No action taken if party/witness tells lies. It will merely harm their case
- If witness cannot attend, trial postponed
- Evidence given orally in presence of parties, and is subject to questioning
- Each party given full opportunity to testify at their discretion to the court, without interruption
- Court may tell person to get to the point. If he fails to do so, it may harm his case
- If later appears that wasted court's time, fined

SENTENCING AND EXECUTION OF SENTENCES IN THE CUSTOMARY COURTS

Sentence or judgment

- Judgment based on consensus (no maj or minority)
- Reconciliation, restitution
- Each case judged on its merits – no *stare decisis*

Factors in determining amount of compensation:

- 1.) Damage done intentionally?
- 2.) Unfounded claims
- 3.) Attitude of parties concerned
- 4.) Status

- 5.) Economic situation
- 6.) Circumstances of parties when offence took place

Mangangahlaa – court levy/court costs

- Compensation to court for time of members
- In order to close proceedings
- Goat/head of cattle (if long case) slaughtered for members of court and eaten in a meal shared by them and litigants – also plays role in reconciliation
- Element of punishment (unreasonably refused to come to accord w/ otherparty during negotiations)
- Today, money – paid into tribal fund
- Due from party against whom judgment given

Execution of sentence or judgment

- Execution takes place as soon as possible after sentencing or judgment (unless on appeal)
- Any delivery of goods takes place at court
- Possible to seize goods, even by force (not today)
- Today, execution of judgment requires prior registration at local MC
- BAA 1927: another way of exacting unpaid fines – arrest, MC 48 hours, ordered to pay immediately. Failure – imprisonment not exceeding 3 months

AFRICAN CUSTOMARY CRIMINAL LAW

ACT AS AN ELEMENT OF A CRIME

Crime – human act that is in conflict with the generally accepted interests of the community, that can be blamed on the perpetrator, and the consequence of which is that the perpetrator may be punished by the community

Elements of a crime: [AUGP]

- 1.) Human **A**ct (act/omission)
- 2.) Act must be **U**nlawful
- 3.) **G**uilt – must be possible to blame perpetrator. Relation between act and consequences examined
- 4.) **P**unishment – community must be of opinion that act should be punished

Differences between crime and delict:

	Crime	Delict
Parties harmed	Community	Individuals/agnatic groups
Property affected	Public property	Property of a particular agnatic group or individual
Procedure	Must be tried in court in the first instance	Mediation before legal proceedings instituted
Punishment/compensation	Offender punished	Damages paid to harmed party

In ACL, certain acts constitute both crime and delict. No separate actions; matter as a whole is settled in court

No prescription of crime

The act

- Only **conscious human** acts constitute crimes
- Unconscious/involuntary acts not crimes
- Act must **cause harm** (attempt not punishable)
- Acts performed by animals – not crimes
- Criminal act may involve an omission
- However, nobody has duty to prevent a crime

Cause and effect: the problem of causality

- In ACL, no theory of causation
- People know from general experience that a certain act causes a particular effect
- Criterion: experience of the community
- Every act that constitutes an indispensable condition for a particular state of affairs = cause
- Poisoning – not necessarily cause death

More than one perpetrator and co-liability

Co-perpetrator	Accomplice	Accessory after the fact
Participates in crime (conscious collaboration required)	Assists another who has committed a crime (helper)	Helps criminal evade liability (hiding) – <i>independent crime</i>

If a person persuades, orders or bribes another person to commit a crime, he is also considered to be participating

Whether perpetrators equally involved or not doesn't matter

In ACL, **head of the agnatic group** also liable for crimes of its members. Based on group rights and duties. Fines paid by group, represented by head. Northern Sotho: *a cow is brought to ruin by her calf.*

UNLAWFULNESS, GUILT AND PUNISHMENT AS ELEMENTS OF A CRIME

Unlawfulness

- In conflict/harmful to interests of community

Grounds of justification: [DN-SEIC-ID]

- Excludes the unlawfulness of an act
- 1.) **Defence** – self-defence/defence of others; persons or property against unlawful attack; need not flee
- 2.) **Necessity** (e.g. breaking into a person's home to extinguish a fire; killing a sorcerer)

- 3.) **Self-help** (e.g. thief, rapist, adulterer caught in the act may be assaulted/killed); but NOT vengeance so assault after the fact not allowed
- 4.) **Executing orders**
- 5.) **Impossibility** (of executing an order)
- 6.) **Consent** – agnatic group has consented
- 7.) **Institutional action** (e.g. circumcision in initiation ceremonies that cause injuries)
- 8.) **Discipline** (adult over child; initiation master)

Defence	Necessity
Defence against an attack by another person that has already begun/threatening to begin	Any condition that poses a threat to a person or property

Guilt

- **2 forms of guilt (culpability):**
- 1.) **Intent** (malice) - required for most African customary law crimes
- 2.) **Negligence** – official discipline not adhered to/ culpable homicide – unlawful and negligent killing
- Small child/insane person not criminally liable. It is said that an insane person *is not a whole person and his actions are like an injury caused by a tree trunk*
- Intoxication does not exclude criminal liability. Also not a mitigating factor if accused himself responsible for the condition. If made to commit crime in such a condition, it is mitigating
- Supernatural cause (sorcery) does not exclude criminal liability but may be a mitigating factor

Punishment

- Originally, the **ff forms of punishment** in ACL:

 - 1.) Death penalty
 - 2.) Banishment
 - 3.) Confiscation of property
 - 4.) Removal of offender to an appointed area with the communal territory
 - 5.) Fines (stock)
 - 6.) Corporal punishment
 - 7.) Compulsory labour
 - 8.) Warning

Punishment may be increased by combining any of above-mentioned forms of punishment. Imprisonment unknown

Factors influencing determination of punishment

- **Mitigating circumstances:**

 - 1.) Insignificance of offence
 - 2.) Youth
 - 3.) Provocation
 - 4.) Diminished liability

- **Aggravating circumstances:**

 - 1.) Seriousness of crime
 - 2.) Use of force in perpetration of crime
 - 3.) Perpetration of crime within victim's dwelling
 - 4.) Repeated perpetration of crimes

Further, intentional unlawful acts punished more severely than negligent acts

Nowadays, African customary court may still impose punishment in accordance with customary law, but with the following limitations:

- 1.) No punishment resulting in death, mutilation or bodily harm, incl corporal punishment
- 2.) Maximum fine limited
- 3.) May not sentence person to imprisonment

CONTEMPT OF THE RULER, ASSAULT AND RAPE

Contempt of the ruler

- Serious crime
- Any act of a subject that intentionally rejects, disregards, opposes or disputes the authority of a ruler constitutes a crime
- Rejection of authority of traditional leader, national assembly or representative of ruler (headman or messenger) also regarded as contempt of the ruler
- Requires intent
- Stranger to ruler's area does not have allegiance to ruler and cannot commit this crime
- Former days, punished by:
 - ✚ Banishment
 - ✚ Death penalty
 - ✚ Fine
 - ✚ Corporal punishment
- Nowadays, only valid form of punishment: fine

Assault

- Unlawfully and intentionally hurting another person's body (blood, bodily injury)
- If no blood/injury – no offense of assault
- Intention and unlawfulness are requirements
- Less serious – delictual element; settlement
- Punishment: fine/corporal punishment/combinatn
- Nowadays, pay medical costs - compensation

Rape

- Man uses violence to force woman to have sex with him without being married to him
- Sex with a girl who is not sexually mature also rape even if no violence
- Only man can commit rape
- Violence is a requirement. Woman must offer resistance unless threatened
- Woman must report matter to head of her family immediately
- Some groups require penetration (if none, assault)
- Also harms honour of agnatic group – consent not a defense
- Punishment: death, fines, corporal punishment
- Caught in act – self-help/satisfaction

- Nowadays, may not be tried by an African customary court as a crime, but only as a delict

TRADITIONAL LEADERSHIP

LEGAL RECOGNITION OF TRADITIONAL LEADERS

Consti makes provision not only for traditional authorities, but also for recognition, institution, status and role of traditional leadership (sec 211(1) and (2))

Traditional leadership

- Sec 211(2) refers to a traditional authority *that observes a system of indigenous law*
- Cultural institution which has been handed down from generation to generation
- Traditional Leadership and Governance Framework Act 41 of 2003 refers to traditional leadership as *the customary institutions or structures as recognised, utilised or practised by traditional communities*

Implications for constitutional recognition

Sec 211(1): the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution

Sec 211(2): a traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs

Inclusion of traditional leadership in a democratic constitutional dispensation leads to certain inconsistencies:

- Leg: democracy implies elections. Tradl system – hereditary leadership based on male primogeniture
- Official holds office for life instead of fixed term
- Inconsistency brought to fore when we look at powers given to traditional leaders at provincial and national levels.
 - ✚ Natl level: elected to national council
 - ✚ Provl level: elected or appointed by tradl authorities to provincial houses
 - ✚ Limited powers: cannot legislate independently – laws made must be considered by provl and natl legislature. Can insist on being consulted about matters of ACL but can do little more than delay leg process if they disagree
- Clash between equality clause and male succession and patrilineal system of descent
 - 1.) Generally accepted cultural tradition = “unreasonable discrimination”?
 - 2.) Sec 36(2): *indigenous legal rule does not limit fundamental rights in consti, except as determined in*

subsection (1) or any other determination of the Constitution. Sec 211 and 212 make provision for continued existence of traditional authorities. If principle of patrilineal succession abolished, no longer traditional

3.) Political background that resulted in ch 12 on tradl authorities in consti – tradl leaders specifically persuaded to support consti and new political dispensation on condition that tradl form of govt would be protected

TRADITIONAL AUTHORITY IN SOUTH AFRICA

Basis for traditional rule is traditional state/community

This section deals with characteristics of traditional state/community in SA before it was subjected to large-scale influence from Western institutions of authority

Characteristics of the traditional state

Traditional state: people in a cultural context who comprise an autonomous jural community

Jural community: political unit with its own juristic life

- 1.) Own territory – boundaries demarcated
- 2.) Own household – denotes interaction bet members of jural community
- 3.) Own public law authority – organs of authority that exercise authority within community and also represent community against outside jural communities. Head is most important organ

Factors influencing establishment and structure:

- 1.) Genealogical factors
- 2.) Religious factors
- 3.) Territorial factors

State comprised a hierarchy of constituent jural communities.

- Empire
- Federation of tribes
- Tribe
- District/section
- Town and town wards
- Ward

Organ of authority of smallest/lowest jural community subordinate to authority of next higher jural community

Every ward generally comprised a number of family groups

No separation of powers. Head of comprehensive jural community exercised exec, leg and judl functions. Lower organs of authority had no leg functions, only exec and jud

Statutory framework for traditional leadership and institutions

Traditional Leadership and Governance Framework Act 41 of 2003

Recognition of traditional communities

Sec 2(1) community may be recognised as a traditional community if

- (a) *It is subject to a system of traditional leadership in terms of that community's customs; and*
- (b) *Observes a system of customary law*

(2) *Premier of a province may, by notice in the Provincial Gazette, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders, community concerned and king and queen, recognise a community as a traditional community*

Sec 2(3): traditional community must transform and adopt customary law and customs to comply with BoR and consti

Withdrawal of recognition of traditional communities

Sec 7(1) withdrawal may only be considered where –

- (a) *Community concerned requests Premier*
- (b) *Provl govt requested to review position of community that was divided/merged prior to 1994 by law*
- (c) *2 or more communities request to be merged*

(2) *withdrawal must be done by Premier in accordance with applicable legislation which must provide for:*

- (i) *withdrawal of recognition of traditional council*
- (ii) *consultation with provincial house of tradl leaders, community, king and queen before withdrawal affected by notice in PG*

Recognition of traditional leaders

- Dates back to pre-colonial times.
- New consti disp, regulated constitutionally and leg

Functions and roles of traditional leaders

Sec 19: A traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation

Sec 20(1) natl govt or provl govt may, through leg or other measures, provide a role for tradl councils or tradl leaders in respect of –

- (a) *Arts and culture*
- (b) *Land administration*
- (c) *Agriculture*
- (d) *Health*
- (e) *Welfare*
- (f) *Administration of justice*
- (g) *Safety and security*
- (h) *Registration of births, deaths and CMs*
- (i) *Economic devt*
- (j) *Environment*
- (k) *Tourism*

- (l) *Disaster management*
- (m) *Management of natural resources*
- (n) *Dissemination of info rel to govt policies/programs*

Traditional councils

- In exercise of his functions, tradl leader traditionally assisted by various councils who acted as advisors – 4 types:
 - 1.) Private council
 - 2.) General/representative council
 - 3.) Court council
 - 4.) People's assembly

Recognition of traditional councils (Sec 3)

- Once Premier recognised tradl community, comm must est a tradl council in line with provl legn
 - ✚ up to 30 members
 - ✚ at least 1/3 must be women
 - ✚ members must comprise –
 - 1.) tradl leaders and members of comm
 - 2.) selected by senior tradl leader
 - 3.) 40% democ elected for term of 5 yrs
- Premier by notice in Prov Gazette and in accdnce with relevant provl legn, recignise tradl council

Functions of traditional councils (Sec 4)

- 1.) Administering affairs of tradl community in accordance with customs and tradition
- 2.) Assisting, supporting and guiding tradl leaders
- 3.) Supporting municipalities in identification of community's needs
- 4.) Participatg in devt of policy and legn at local level
- 5.) Participating in devt programmes
- 6.) Promoting ideals of cooperative governance
- 7.) Performing functions conferred by customary law

Houses of traditional leaders

- 2 categories:
 - 1.) National house and provincial houses of traditional leaders (sec 212, consti; Framework Act; National House of TL Act 22 of 2009)
 - 2.) Local houses of traditional leaders (sec 17, FA)

National House of Traditional Leaders (Act 22, 2009)

- Sec 2: establishment; term: 5 years
- Sec 3: composition
 - ✚ 3 persons who are senior tradl leaders elected by each provl house
 - ✚ At least 1/3 must be women
- Sec 4: election – provl houses elect from members
- Sec 5: qualification – not eligible if
 - ✚ Member of mun council, provl leg or Parl
 - ✚ Serving sentence of imprisonment
 - ✚ Unrehabilitated insolvent
 - ✚ Unsound mind
 - ✚ Convicted of criminal offence and sentenced to more than 12m imprisonmt

- ✚ Not SA citizen
- ✚ Not permanently resident in RSA
- Sec 6: vacation of seats
 - ✚ Death of a member
 - ✚ Resigns by written notice
 - ✚ Disqualified (sec 5)
 - ✚ Absent 3 consecutive meetings w/o leave
 - ✚ Breach of code of conduct
 - ✚ Member ceases to be member of provl house that elected him/her
- Sec 11: powers and duties
 - ✚ Cooperate with prov houses of TL
 - ✚ Consider Parliamentary Bills referred to it*
 - ✚ Advise Natl govt and make recommendations re tradl leadership and customary law

* ***Referral of Bills to the National House of TL*** – any parliamentary bill pertaining to customary law or customs of traditional communities must be referred to the National House of Traditional Leaders for comments

Local Houses of Traditional Leaders (Sec 17)

- Number of members – no more than 10 or 20
- Elected by electoral college consisting of kings and queens or their reps and senior traditional leaders residing within the district municipality

SUCCESSION TO TRADITIONAL LEADERSHIP

Indigenous principles of succession to tradl leadership

- 1.) Hereditary system; follows patrilineage
- 2.) Successor is eldest son of ruler by tribal/main wife
- 3.) Other wives ranked – impt where regent appointed
- 4.) Sons of ruler retain rank of mothers
- 5.) Substitution
 - a.) Of ruler: *levirate*
 - b.) Of tribal wife: *sororate*

Reform of principles of succession

Shibulana v Nwamitwa: case concerned constitutionality of principle of male primogeniture that governed succession to chieftainship. Ms. Shilubana was only child of deceased traditional leader so his younger brother succeeded him. Royal family passed resolutions that she would succeed her uncle in line with constitutional precepts of equality. When he died, his eldest son contested her succession to position. CC held that community had right to develop its own law and customs. Women can now also be considered for succession in accordance with gender equality (sec 9 of consti).

Legislative measures governing succession to TL

- At present, provinces are vested with power to recognise and appoint traditional leaders

- Provincial legislature not bound by local law of succession of a particular tribe
- In practice, however, tribes are usually permitted to nominate a person according to tribal law
- Although modern law occasionally provides for observation of African law of succession, authorities are not bound by it
- Framework Act:
 - 🚩 King/queen recognised by President by notice in GG; certificate of recognition
 - 🚩 Senior TL, headmen/headwomen recognised by Premier by notice in PG; certificate of recog; informing House of TL

Problems in connection with succession

- Tribal fission in case of dispute no longer possible – unallocated land no longer available
- Modern times – HC. Seldom succeeds in solving

Causes of succession disputes

- 1.) Traditional leader tries to divorce tribal wife without cooperation of ruling family
- 2.) Traditional leader marries a wife in a civil marriage without cooperation of ruling family. She is then only wife and sometimes regarded as tribal wife although in terms of customary law she is not
- 3.) Appointment of tribal wife or other wife as regent
 - a.) She associates with unacceptable males
 - b.) Refuses to cooperate with ruling family
 - c.) Wife who is not tribal wife tries to usurp traditional leadership for her son
 - d.) Tribal wife opposed by deceased chief's brothers and half brothers
- 4.) Ranking of wives gives rise to disputes (order)
- 5.) Temporary lack of tribal wife causes problems – wife who temporarily took over claims position
- 6.) Biological paternity of successor disputed
- 7.) Witchcraft – accusations against tribal wife to exclude rightful successor
- 8.) Substitution – man/woman who acted as substitute sometimes claim privileges of man or woman for whom they substituted

What influence can succession disputes have on the tribal authority?

It can bring administration to a halt, and divide the traditional authorities into opposing parties so that nothing gets done for the community.

Resolution of succession disputes

- Seek to resolve dispute internally, accdg to customs
- If can't, referred to relevant provincial house of TL
- Unable, referred to Premier of province concerned

Commission on Traditional Leadership Disputes and Claims may decide on any tradl leadership dispute and claims arising in any province (Sec 25) applying customary law and customs of relevant tradl community

TRADITIONAL LEADERSHIP AND GOVERNANCE

Traditional administrative act – action of an administrative organ, such as the chief, ward head, etc

General determination	Particular determination
Applies to all subjects	Applied to particular subject

Rules of creation, revocation & interpretation are different

Disregard of **valid** determination = crime

Validity requirements

- 1.) **Author** – ruler in consultation with tradl authority
- 2.) **Form of the act**
 - a.) Announcement – notification
 - b.) Content – clear and understandable
 - c.) Correct procedures – must consult tradl auth
- 3.) **Purpose of the act** – particular objective; authorised purpose
- 4.) **Consequences of the act** – reasonable
 - a.) Consequences and effect must be possible
 - b.) Rights and freedoms of subjects must not be exceedingly burdened
 - c.) No unlawful discrimination

Requirements for administrative determinations incomplete unless law provides for methods to enforce requirements

Control over TL's administrative actions

- 1.) **Consultation with councils** (tradl authority) – precedes administrative action
- 2.) **Mediation** – intervention of 3rd party (council)
- 3.) **Judicial control according to customary law** – ACL does not allow court action by subject to oppose administrative action of ruler in tribal court because ruler would have to act as judge and accused in same case. Can use *indirect* means by raising invalidity as a defence in a crim suit
- 4.) **Internal review according to common law** – local magistrate, provincial minister entrusted with tradl authorities and President can review
- 5.) **Judicial control according to common law** – internal review not a pre-requisite
 - a.) Review of validity of administrative act
 - b.) Interdict
 - c.) Mandamus
 - d.) Indirect – invalidity raised as defence

Today, traditional leader is held privately and criminally liable for his invalid administrative actions

Sec 6(1), Promotion of Administrative Justice Act, 2000 applies to admin decisions of TLs: *any person may institute procdgs in a court/tribunal for the judicial review of an admin action*

☺ GOOD LUCK! ☺